No. 340

In the Supreme Court of the United States

OCTOBER TERM, 1960

INTERNATIONAL TYPOGRAPHICAL UNION, AFL-CIO, HAVERILL TYPOGRAPHICAL UNION NO. 38 AND WORCESTER TYPOGRAPHICAL UNION, NO. 165, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The opinion of the court of appeals (R. 513–527) is reported at 278 F. 2d 6. The findings of fact, conclusions of law, and order of the Board (R. 480–485, 412–468) are reported at 123 NLRB 806.

JURISDICTION

The decree of the court of appeals was entered on May 10, 1960 (R. 527–528). A petition for rehearing was denied on June 10, 1960 (R. 529). The petition for a writ of certiorari was filed on August 18, 1960, and was granted on November 7, 1960, 364 U.S. 878 (R. 529).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> SEC. 8(a). It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or

the effective date of such agreement, whichever is the later * * * *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an

employer provided it is the representative of his employees subject to the provisions of section 9(a);

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: * * *

QUESTIONS PRESENTED

Petitioner unions insisted, as a condition to the execution of a collective bargaining agreement, that the employers accept a clause incorporating the General Laws of petitioner International ("ITU") "not in conflict with * * * federal or state law," and a clause vesting exclusive hiring authority in a foreman required to be a union member. The questions presented are:

1. Whether the Board properly concluded that acceptance of the proposed Laws and foreman clauses would have established an employment system which conditioned employment upon union membership, in violation of Sections 8(a)(3) and 8(b)(2) of the National Labor Relations Act.

2. If the first question is answered in the affirmative, these further questions are reached:

(a) Whether petitioners violated the bargaining obligation imposed by Section 8(b)(3) of the Act by refusing to execute a contract unless it contained the illegal Laws and foreman clauses.

(b) Whether petitioners violated Sections 8(b)(2) and 8(b)(1)(B) of the Act by striking to compel the employers to include the illegal Laws and foreman clauses in a contract.

(c) Whether the Board's order is proper.

(d) Whether petitioner International was properly held jointly responsible for the unfair labor practices found.

STATEMENT

A. THE BOARD'S FINDINGS

1. *The Worcester negotiations*

Worcester Telegram Publishing Company, Inc., ("Worcester") publishes the Worcester Telegram, a daily newspaper. Petitioner Local 165 has represented Worcester's composing room employees for many years. A collective bargaining agreement for these employees expired on December 31, 1954. In June 1955, following unsuccessful negotiations for a new contract, Worcester granted a wage increase, retroactive to January 1, 1955. On August 21, 1956, Local 165 submitted a proposed new contract to Worcester.

Article I, Section 3 of the proposed contract redefined Local 165's jurisdiction to include "paste-make-up" operations which had been performed for many years by artists who worked outside the composing room and who were not members of Local 165 (R. 421–422, 448–449, 488–489). The section further in-

cluded within Local 165's jurisdiction operations in connection with any new printing methods or processes which Worcester might introduce during the term of the contract.

Article I, Section 5 of the proposed contract provided, as had the 1954 contract, that the composing room foreman must be a member of Local 165 and that he should have exclusive control over employment in the composing room. It read (R. 349, 420–421):

> The operation, authority, hiring for and control of each composing room shall be vested exclusively in the office through its representative, the foreman, who shall be a member of the Union * * *
>
> The Union shall not discipline the foreman for carrying out written instructions of the publisher or his representative authorized by this Agreement.

Article I, Section 7 of the proposed contract provided, as had the 1954 contract, that the ITU General Laws "not in conflict with state or federal law, shall govern relations between the parties on those subjects concerning which no provision is made in this contract" (R. 421). The ITU General Laws, *inter alia*, claimed jurisdiction for the ITU over all printing and mailing work, required foremen and journeymen employed in the printing trades to be active members of the local union, reserved to the ITU exclusive control over apprenticeship and employment priority systems, and permitted only ITU members to install, operate, or service machines and devices used in composing rooms (R. 422–424).[1]

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[1] See, also, the Board's brief in *National Labor Relations Board* v. *News Syndicate Company, Inc., et al.*, this Term, pp. 6–7, n. 4.

The first meeting on Local 165's contract proposals was held on October 14, 1956. General Manager Steele advised the Union representatives that it would be useless to discuss other matters until the parties reached agreement on the jurisdiction clause and the clause incorporating the ITU's General Laws (R. 424; 179). Union President Quinn declared that the Union's proposed language on these clauses "must be taken as it was submitted" (R. 424; 110).

Worcester submitted a counterproposal at a meeting on November 1 (R. 424; 371–372). The Company offered the Union jurisdiction over all composing room work, including "but * * * not limited to" the classifications enumerated in the 1954 contract. It proposed inclusion of the ITU General Laws "to the extent that they are negotiated and become a part of the contract." Finally, the Company offered to discuss all other contract matters once agreement was reached upon the "matters of jurisdiction and observance of ITU General Laws." Union President Quinn stated that the Union wanted a written contract, but that such a contract "must contain language [on jurisdiction and the ITU General Laws] approved by Indianapolis, the ITU headquarters, and that was it" (R. 425; 111).

The negotiators again met on November 8, November 29, and December 6, but failed to reach agreement on the "key clauses" of jurisdiction and incorporation of the ITU General Laws (R. 425–426; 182–185). At the next meeting, on January 8, 1957, the Union representatives were accompanied by ITU International Representative LaMothe (R. 427; 187).

LaMothe insisted that "the union language must be taken" on jurisdiction and incorporation of the ITU General Laws (R. 427; 112). Worcester offered to negotiate the General Laws individually (R. 427; 112, 118). LaMothe refused this offer and said he would notify the federal and state mediation services that the parties had reached a stalemate (R. 427; 112).

At a meeting arranged by the mediation services on January 30, Worcester's attorney, Elisha Hanson, declared that Worcester would not be "bludgeoned" into an illegal contract and hence would not accept the ITU General Laws *in toto* (R. 428; 113). He submitted a counterproposal on February 6. It contained provisions respecting hours, wages, and conditions of employment, but eliminated the 1954 contract requirement that the composing room foreman be a member of the Union, contained no reference to the ITU General Laws, and preserved the Union's representation over skilled work normally performed in the composing room before January 1, 1959 (R. 429; 113, G.C. Exh. 5).

The parties met on February 8, but again failed to agree on jurisdiction and the ITU General Laws (R. 429; 114). Following Hanson's suggestion, the parties discussed and agreed upon the terms of an interim arrangement covering wages, hours, and conditions of employment (R. 429–430; 114–115, 119, 193–194). On February 14, the Union advised Worcester that its members had agreed to work under the terms of this arrangement, reserving the right

to resume negotiations for a complete contract at any time (R. 430; 376–377).

The parties did not meet again until November 26, 1957 (R. 432; 379–380). Charles M. Lyon, first vice president of the ITU, was the principal spokesman for the Union (R. 432; 116–117). Lyon disagreed with Hanson's insistence that the Union's proposals on jurisdiction, incorporation of the ITU General Laws, and foremen were illegal (R. 432–433; 117). After some discussion, Hanson suggested that the parties could resolve their economic differences and agree on a contract if the Union would compromise its demands on the three key clauses (R. 433–434; 117–118, 169, 170). Lyon asserted that the Union "was fighting for job security" and announced that a strike vote had been taken (R. 434; 117).

The next day, November 27, Lyon refused Hanson's offer to submit the key clauses to arbitration (R. 434; 118–119). Following a union caucus, Lyon announced that the Union had placed the matter in his hands, and "because of differences of opinion regarding legalities of certain questions, because the Union was dissatisfied with wages paid and hours worked, 'we say good day and goodbye'" (*ibid.*).

2. *The Haverhill negotiations*[2]

Petitioner Local 38 has represented Haverhill's composing room employees for many years. In

[2] This summary of facts is based upon the record in *Alpert* v. *ITU*, 161 F. Supp. 427 (D. Mass.), an injunction proceeding brought by the Board under Section 10(j) of the Act, which the parties made part of the record in the proceeding before the Board (R. 415–416).

December 1956, Local 38 submitted a proposed contract to Haverhill containing the same jurisdiction, ITU General Laws, and foreman clauses involved in the Worcester negotiations (R. 435; 395–411). The parties met five times between December 1956 and November 8, 1957, without reaching agreement on any major issue. Haverhill rejected the Union's jurisdiction clause in so far as it covered processes and machines no longer in use, refused to accept the clause on the ITU General Laws, and objected in principle to the foreman clause (R. 436; 41–44). The parties also failed to agree on wage and vacation provisions (R. 437–438; 47–49).

On November 19, 1957, after the composing room employees had engaged in a two-hour work stoppage, Haverhill arranged a meeting between Manager Phillips and Associate Manager Parry of the New England Daily Newspaper Association, and Vice-President Lyon and International Representative LaMothe of the ITU (R. 438; 72–73). Phillips stated that the jurisdiction, ITU General Laws, and foreman clauses of the proposed contract were illegal and offered to submit a counterproposal (R. 439; 58). Lyon defended the legality of the disputed clauses and ended the meeting by saying he was "going to pull the boys out" (R. 439; 39, 58). Lyon and LaMothe then went to the composing room, and, about a minute later, the employees went out on strike (R. 439–440; 58). The strike was sanctioned by the ITU (R. 443; 97).

At the request of federal and state mediators, Phillips and Parry met with Lyon, LaMothe, and the

Union scale committee on November 21. The parties reviewed the Union's proposed contract section-by-section but failed to agree on any material provision (R. 440; 81–82). A Haverhill proposal to negotiate the ITU General Laws was rejected by Lyon, who declared that the Union had to have an ITU-approved contract (R. 441; 64–65).

Another meeting was held on November 23. The Union rejected a Haverhill proposal to make foreman membership in the Union optional (R. 442; 68–69). At the suggestion of the conciliators, the negotiators then summarized the basic bargaining issues as follows (R. 442):

> First was the limitation of, restriction of the use of teletype tape. The second was jurisdiction over new processes, and third was refusal of the employer to agree that the foreman shall be a member of the union, and the fourth was refusal of the employer to accept the general laws of the International Typographical Union.

The meeting ended when Lyon refused Haverhill's offer of full arbitration of these matters (R. 442; 72).

B. THE BOARD'S CONCLUSIONS AND ORDER

Upon the foregoing facts, the Board found that the units described in petitioner's proposed jurisdiction clauses were not appropriate for collective bargaining purposes, and that the proposed clauses incorporating the ITU General Laws and vesting exclusive employment authority in a foreman required to be a union member were also illegal in that they

established closed-shop conditions in the composing room (R. 481, 444–452). Accordingly, the Board concluded that, by demanding that Worcester and Haverhill execute a contract containing these illegal clauses, petitioners refused to bargain collectively, in violation of Section 8(b)(3) of the Act (R. 481, 456). The Board further found that the primary purpose of the strikes against Worcester and Haverhill was to force them to accept these illegal clauses, and therefore, by engaging in this strike activity for the foreman and ITU General Laws clauses,[3] petitioners attempted to cause discrimination in violation of Section 8(b)(2) of the Act (R. 481, 456–458).[4] Finally, the Board found that, by striking for the foreman clause, petitioners restrained and coerced Worcester and Haverhill in the selection of their representatives for the adjustment of grievances, thereby also violating Section 8(b)(1)(B) (R. 481, 458).

The Board's order (R. 481–485) required petitioners to cease and desist from the unfair labor practices found, and from in any other manner causing or attempting to cause Worcester or Haverhill to discriminate against employees in violation of Section 8(a)(3) of the Act. Affirmatively, the order required petitioners, upon request, to bargain collectively with Worcester or Haverhill, and to post appropriate notices.

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[3] The Board found it unnecessary to pass upon the Trial Examiner's finding that petitioners also violated Section 8(b)(2) by striking for the jurisdiction clause (R. 481, n. 2).

[4] The Board further found that, in so far as the strike also encompassed a demand for the apprenticeship and priority systems established in the General Laws, it further violated Section

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals agreed with the Board that the Laws clause proposed by petitioners would have established illegal closed-shop conditions in the composing room, and also agreed that the proposed foreman clause was illegal in that it required employers to discriminate in favor of union men in appointing their foremen, thereby encouraging employee aspirants for promotion to join the Union (R. 520–525).[5] The court thus affirmed the Board's unfair labor practice findings based upon petitioners' demand and strike for these clauses, and enforced its order. However, it modified the order by restricting it to the specific practices found to be unlawful, and practices "persuasively related thereto" (R. 526–527).

SUMMARY OF ARGUMENT

I.

A. Section 8(b)(2) of the Act makes it an unfair labor practice for a labor organization "to cause or attempt to cause an employer to discriminate" in violation of Section 8(a)(3). In turn, Section 8(a)(3) makes it an unfair labor practice for an employer "by discrimination in regard to hire or

8(b)(2), since they delegated to the union exclusive control over their establishment and maintenance (R. 481, n. 2).

[5] The court rejected the Board's finding that the jurisdiction clause demanded by petitioners was illegal and hence that petitioners' demand for this clause was violative of its bargaining obligations under the Act (R. 518–520). The Board did not seek certiorari on this issue.

tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." The basic issue here, as in *National Labor Relations Board* v. *News Syndicate Company, Inc., et al.*, No. 339, this Term, is whether a contract which incorporates the ITU General Laws "not in conflict with state or federal law" violates Sections 8(a)(3) and 8(b)(2) in that it may be deemed to include those provisions of the Laws limiting employment to union members.

This case also presents the question, which is also a subsidiary issue in No. 339, whether Section 8(a)(3) is violated by a contract provision which delegates exclusive control over hiring to a foreman who is required to be a union member and thus to abide by union rules which condition employment on union membership. However, contrary to the situation in No. 339, a contract with the questionable clauses was not actually entered into here, and hence the legality of the clauses under Sections 8(a)(3) and 8(b)(2) is presented only indirectly. That is, the clauses must first be found illegal in order to sustain the Board's findings that petitioners' insistence thereon constituted a violation of the bargaining obligation imposed by Section 8(b)(3) and their subsequent resort to strike pressure to obtain these clauses constituted an independent attempt to cause discrimination in violation of Section 8(b)(2).

B. Although, as was recognized in Chief Judge Woodbury's opinion for the Court of Appeals (R. 525), the "question is not free from doubt", we think the court was correct in concluding that the Board was entitled to find that the General Laws clause, demanded by petitioners, would have imposed closed shop conditions in violation of Section 8(a)(3) and 8(b)(2) of the Act. As shown in the Board's brief in No. 339, the ITU has historically maintained closed shop conditions in the printing industry by means of contracts incorporating its General Laws, which, *inter alia*, restricted employment to union members and vested exclusive hiring authority in foremen required to be union members. Moreover, even after the 1947 amendments to the Act outlawed the closed shop, the ITU sought to continue it. Against this background, the contracting parties could reasonably foresee that, if they incorporated the General Laws and merely added the proviso "not in conflict with law," the employees would not undertake to decide for themselves which of the Laws were excluded as illegal but instead would be more likely to conclude that all of the Laws were incorporated, including those requiring union membership as a condition of employment, at least until an appropriate

tribunal should rule otherwise. In the Board's view, employees in an industrial plant could not be expected to play the role of lawyer or judge and to make a nice calculation as to which, if any, of the General Laws would be inoperative as "in conflict with law." Accordingly, if the parties adopted the vague exclusionary technique of the Laws clause, the practical effect would be to establish closed shop conditions the same as if they entered into a contract which expressly conditioned employment on union membership. The validity of this conclusion is confirmed by the fact that during negotiations here petitioners refused to discuss or arbitrate even the palpably illegal closed shop provisions in the General Laws, taking the position that the Laws clause had to be accepted *in toto* as proposed.

Even if the parties themselves understood that "not in conflict with law" was intended to exclude the closed shop provisions of the General Laws from the contract—an assumption which is contrary to the understanding of the publishers in this case—that does not end the matter. Since a union security provision has an impact on employees, it is necessary to consider not only what it means to the contracting parties, but also how the employees are apt to view it. Here, as the Board found, it was reasonably foreseeable that the employees would interpret the words used as providing for a closed shop.

C. The further clause which petitioners demanded—vesting exclusive authority over composing room employment in a foreman who was required to be a member of the ITU—likewise would have imposed

closed shop conditions in violation of Sections 8(a)(3) and 8(b)(2). By vesting hiring authority in a foreman, subject only to the requirement that he be a union member, the employer leaves the foreman free to exercise that authority in accordance with union rules. Indeed, the foreman would be prompted to abide by those rules for a failure to do so would jeopardize his membership in good standing, and, in turn, his job as foreman. Thus, where, as here, the union rules accord preference in employment to union members, the parties, by delegating hiring authority to a foreman who is required to be a union member, must be deemed to have intended to maintain a closed shop.

This conclusion is confirmed by the bargaining negotiations here. First, the foreman clause was coupled with the General Laws clause, which, as we have shown, was tantamount to incorporating the closed shop provisions of the Laws in the contract. Second, the vesting of hiring authority in a foreman, who was required to be a union member, traditionally has been an important part of the ITU's scheme for maintaining closed shop conditions. Recognizing this, the publishers resisted the demand for the foreman clause, and offered instead to make union membership for foremen optional. Petitioners, however, flatly rejected any proposal that would minimize their control over the foreman, and continued to insist on a provision requiring him to be a union member.

In addition, the foreman clause violated Sections 8(a)(3) and 8(b)(2) because, as the court below concluded, it would have caused "the employers to dis-

criminate in favor of union men in appointing their foremen thereby encouraging aspirants for that position to join the union" (R. 522).

II.

The facts show that petitioners not only proposed the illegal Laws and foreman clauses, but made their acceptance by the publishers a condition to the execution of a collective bargaining contract. It is settled law that when a union insists upon an illegal condition it violates its bargaining obligation under the Act. It is irrelevant that the union may in good faith believe that the condition is not unlawful. Cf. *National Labor Relations Board* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342.

III.

Petitioners called a strike to compel acceptance of the illegal foreman and General Laws clauses. The ruling of the court below that strike action in support of such illegal demands is an attempt to cause discrimination in violation of Section 8(b)(2) comports with the rulings of the other courts of appeals which have considered the question. In addition, the strike to obtain the foreman clause violated Section 8(b)(1)(B) of the Act. That section makes it an unfair labor practice for a labor organization or its agents "to restrain or coerce * * * an employer in the selection of his representatives for the purposes of collective bargaining *or the adjustment of grievances*" (emphasis supplied). Since the foremen involved are manage-

ment representatives for the adjustment of grievances, by striking to force the publishers to appoint only foremen who were, or were willing to become, union members, petitioners put pressure on the publishers to confine their choice to that class, thereby necessarily restraining them in their selection of a representative for grievance purposes.

IV.

The Board's cease and desist order is "adapted to the situation which calls for redress" (*National Labor Relations Board* v. *Mackay Radio & Telegraph Company,* 304 U.S. 333, 348), and hence is entitled to stand. Contrary to petitioners' assertion, the order does not restrain them from including in a contract provisions in the General Laws of unquestioned validity; it merely precludes them from insisting upon a Laws clause that does not clearly identify and exclude from the contract those provisions in the Laws, which are of unquestioned invalidity, imposing closed shop conditions. Further, the Board's order does not preclude petitioners from negotiating about the foreman's responsibilities but merely proscribes imposing the condition that the foreman be a union member—at least, where, as here, there are outstanding union rules which require that union members be preferred for employment. Finally, the Board's order does not suffer from vagueness, for its decision furnishes a sufficiently definite standard by which petitioners may assess the validity of particular provisions of the Laws.

V.

In view of the fact that the illegal demands of Locals 37 and 165 were made pursuant to policies established by the ITU, and since Vice-President Lyon and International Representative LaMothe actively participated in negotiations mainly to further these ITU policies, the court below properly approved the Board's finding that the ITU and its executive council were jointly liable for the unfair labor practices found.

ARGUMENT

I. THE BOARD PROPERLY FOUND THAT ACCEPTANCE OF PETITIONERS' PROPOSED LAWS AND FOREMAN CLAUSES WOULD HAVE ESTABLISHED AN EMPLOYMENT SYSTEM WHICH CONDITIONED EMPLOYMENT ON UNION MEMBERSHIP, IN VIOLATION OF SECTIONS 8(a)(3) AND 8(b)(2) OF THE ACT

A. INTRODUCTION

Section 8(b)(2) of the Act makes it an unfair labor practice for a labor organization "to cause or attempt to cause an employer to discriminate" in violation of Section. 8(a)(3). The latter provision, in turn, makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization". Here, as in the companion case, *National Labor Relations Board* v. *News Syndicate Company, Inc., et al.*, No. 339, this Term, the basic issue is whether a contract which incorporates the ITU General Laws "not in conflict with state or federal law"

violates Sections 8(a)(3) and 8(b)(2) in that it may be deemed to include those provisions of the Laws limiting employment to union members. In addition, this case presents the further question, which is also a subsidiary issue in No. 339 (see the Board's brief in No. 339, p. 4, n. 1), whether the ban against discrimination imposed by Section 8(a)(3) is also violated by a contract provision which delegates exclusive control over hiring to a foreman who is required to be a union member and thus to abide by union rules which condition employment upon union membership.

In No. 339, a contract with those clauses was actually entered into by the union and the employer. The validity of such a contract under Section 8(a)(3) and the corollary Section 8(b)(2) is thus directly presented there. For it is settled (Board brief in No. 339, p. 20) that, if a contract has closed shop provisions, the mere existence of those provisions, even apart from their enforcement, violates those Sections.[8]

Here, on the other hand, a contract with the questionable clauses was not entered into, for the employers resisted the union's efforts to secure them. Accordingly, the legality of the clauses under Sections 8(a)(3) and 8(b)(2) is presented only indirectly,

[8] Petitioners' contention (Br. 21, n. 11) that a "contract cannot, until some action is taken under it, 'cause' discrimination within the meaning of Section 8(b)(2)," is negated by the cases set forth in the Board's brief in No. 339 (p. 20, n. 11). They hold that a contract which conditions employment upon union membership, by itself, effects a discrimination which encourages union membership; it classifies employees into two groups—those who are union members and those who are not—and declares that only the former can obtain employment.

namely, as a predicate for the Board's finding that petitioners' insistence upon such clauses constituted a violation of the bargaining obligation imposed by Section 8(b)(3) and their subsequent resort to strike pressure to obtain these clauses constituted an independent attempt to cause discrimination in violation of Section 8(b)(2). In other words, the Board's findings that the bargaining violated section 8(b)(3) and that the strikes violated Section 8(b)(2) are contingent upon the validity of its finding that the clauses sought by petitioners were illegal—that they would have violated Sections 8(a)(3) and 8(b)(2) had they been adopted. Accordingly, the threshold issue here is the same as that in No. 339.

Viewed in this light, it becomes plain that petitioners are mistaken in asserting (Br. 14–15, 28–29, 37) that the Board's case rests on the theory that "the contract proposals here in issue were an 'attempt' to cause discrimination". The Board did not find that the proposal of the clauses was an attempt to cause discrimination within the meaning of Section 8(b)(2), but rather that it constituted a refusal to bargain within the meaning of Section 8(b)(3)—for petitioners were insisting on provisions which, had they been adopted, would have been illegal. Similarly, the Board's Section 8(b)(2) finding was not based on the mere proposal of the illegal clauses, but on the fact that strike pressure was exerted to obtain such clauses.

With the issues in this case thus clarified, we shall show first that the General Laws and foreman clauses sought by petitioners would have established closed

shop conditions in violation of Sections 8(a)(3) and 8(b)(2). We shall then show that the Board properly found that petitioners' insistence on those illegal clauses violated Section 8(b)(3), and that their strikes to secure them violated Section 8(b)(2).[7]

B. THE GENERAL LAWS CLAUSE

The reasons supporting the Board's conclusion that the General Laws clause violates Sections 8(a)(3) and 8(b)(2) are fully stated in our brief in No. 339, to which the Court is respectfully referred. There we show that the ITU historically maintained closed shop conditions in the printing industry by means of contracts incorporating its General Laws, which *inter alia* restricted employment to union members and vested exclusive hiring authority in foremen required to be union members, and that, even after the 1947 amendments to the Act outlawed the closed shop, the ITU sought to continue it. In the context of industrial realities, the contracting parties could reasonably foresee that, if they incorporated the General Laws and merely added the proviso "not in conflict with law," the employees would not undertake to decide for themselves which of the Laws were excluded as illegal but as a practical matter, not being judges or lawyers, would treat all of the Laws as incorporated, including those requiring union membership as a condition of employment, at least until an appropriate tribunal should rule otherwise. Accordingly, if the parties adopted the vague exclu-

[7] The Board also found that the strike to secure the foreman Clause violated Section 8(b)(1)(B). We shall likewise demonstrate the propriety of that finding.

sionary technique of the Laws clause, they must be deemed to have intended to operate under closed shop conditions no less than if they entered into a contract which expressly conditioned employment on union membership.

The negotiations here confirm the validity of the Board's view of the matter. As shown (pp. 7–11, *supra*), the publishers refused to incorporate the General Laws *in toto* on the ground that this would establish a closed shop, and offered instead to negotiate which laws should be included in the contract. Petitioners, however, refused to discuss or arbitrate even the palpably illegal closed-shop provisions in the General Laws, taking the position that the Laws clause had to be accepted as proposed.[8] In short, it is plain that the publishers in fact understood that, in insisting upon the Laws clause, petitioners were calling for the execution and enforcement of contracts contemplating closed-shop conditions in the composing rooms, and petitioners' intransigence at the bargaining table confirmed that belief.

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[8] Petitioners contend (Br. 16, n. 9), that they were willing "to negotiate into the agreement any matter covered by the General Laws." This is negated by the evidence summarized in the Statement, *supra*, showing the Union's persistent refusal to particularize which of the Laws were included. Moreover, President Mahoney of Local 165, who testified concerning the willingness to negotiate, explained that this did not mean that the union negotiators would "take the book of laws and sit down and negotiate and say we will negotiate law No. 1, whether it applies to the contract or not, we would not do that" (R. 234–235). Mahoney conceded that as a member of the ITU in good standing he would not disobey the admonition in the General Laws against negotiation of their terms (R. 216–217; G.C. Exh. 15, pp. 84–85, R. 383).

In the practical context which the Board had to consider, petitioners appear somewhat academic in their contention (Br. 16–27) that the plain language of the proviso to the Laws clause evidences an intention to exclude those provisions which are contrary to law; and, if this be the intention of the contracting parties, the effect of the contract cannot be changed merely because third parties, the employees, might happen to interpret it differently. Cf. *Honolulu Star-Bulletin* v. *National Labor Relations Board*, 274 F. 2d 567, 570 (C.A.D.C.). Even if the parties themselves understood that "not in conflict with law" was intended to exclude the closed shop provisions of the General Laws from the contract[*]—an assumption which is contrary to the understanding of the publishers in this case—it does not follow that this ends the matter. Since the Act gives employees the right to obtain employment without being union members and a contract provision requiring such membership, standing alone and apart from its enforcement,

[*] The analysis is not aided by the fact that the proposed contracts defined journeyman without regard to union membership requirements and the proviso to the Laws clause added that the laws would govern "those subjects concerning which no provision is made in this contract" (R. 351). As the court below noted (R. 523), the "provision that contract terms alone shall govern with respect to all matters as to which it makes any provision does not call for extended consideration, for it is clear that local unions would not, and indeed could not, under ITU rules and regulations, enter into any collective bargaining agreement without ITU approval, and ITU's insistence that 'Union language must be taken' with respect to its general laws demonstrates that ITU would not approve any contract provision substantially in conflict with its laws." See, also, Board brief in No. 339, p. 42, n. 28.

abridges that right, it is necessary to consider not only what the words used mean to the contracting parties, but also what they are likely to mean to the employees, in assessing the validity of a union-security clause. The circumstance that a union-security provision has an impact beyond the contracting parties does at least impose upon them the responsibility for the foreseeable consequence of their conduct on the employees affected thereby.[10] In no meaningful sense can the employees be regarded as "strangers" to a collective bargaining agreement negotiated on their behalf. Here the Board was amply justified in finding that it was reasonably foreseeable that the employees would treat the words used as providing for a closed shop.

In sum, in the light of the ITU's past history of closed shop practices and the role played by the General Laws in maintaining those practices, the practical effect of incorporating the General Laws subject to a vague proviso "not in conflict with law" was that the employees would regard all of the laws as incor-

[10] The problem was viewed this way, not only by the court below (R. 524–525), but also by the Second Circuit in *National Labor Relations Board* v. *News Syndicate Company, Inc., et al.*, 279 F. 2d 323, 328, certiorari granted, 364 U.S. 877, No. 339, this Term (causing petitioners to suggest that the Second Circuit "spoke "elliptically", Br. 21, no. 11). The only difference between the two courts is that, insofar as foreseeable employee response is concerned, the Second Circuit would draw a distinction between the exclusionary clause used here and a savings clause of the type used in *Red Star Express Lines* v. *National Labor Relations Board*, 196 F. 2d 78 (C.A. 2), whereas the court below could find no meaningful distinction between the two. For the reasons set forth in our brief in No. 339, pp. 39–41, we submit that the court below was correct.

porated, including the closed shop provisions, at least until an appropriate tribunal should rule otherwise. Hence, the Board and the court below properly concluded that the General Laws clause, demanded by petitioners, would have imposed closed shop conditions in violation of Sections 8(a)(3) and 8((b)(2) of the Act.

C. THE FOREMAN CLAUSE

The further clause on which petitioners insisted—vesting exclusive authority over composing room employment in a foreman who was required to be a member of the ITU—likewise would have imposed closed shop conditions in violation of Sections 8(a)(3) and 8(b)(2). As a union member the foreman, like other union members, would be obliged to follow the ITU General Laws.[11] These Laws, as we have shown, provided that work in the composing room could only be performed by union members, established a system of priority among union members with respect to the assignment of work and in the event of layoffs, and required apprentices to meet standards regulated by the union. Accordingly, by delegating exclusive control over hiring to the foreman in these circumstances, the employer could expect that he would use that power to favor union members and apprentices who had been approved for such membership, and that the em-

[11] The Constitution of the ITU (G.C. Exh. 15, p. 15, R. 383) provides that it is the duty of each member of the ITU "to comply with all the laws, rules, regulations and decisions of the [ITU] and of any subordinate union to which the member may belong."

ployees themselves would so view such a grant of authority. Thus here, as with the Laws clause, if the employer were to agree to the foreman clause, he must be deemed to have intended to operate under closed shop conditions no less than if the contract had so stated explicitly.

Petitioners contend, however (Br. 34–36), that, since the foreman was acting, at least in part, as the agent of the employer in hiring and in operating the composing room, it cannot be assumed that he would let his duty to the Union. (*i.e.*, to prefer union members) take precedence over his duty to the employer (*i.e.*, to hire and fire on the basis of competency). Indeed, petitioners point out that the proposed foreman clause (R. 349) provided that the "Union shall not discipline the foreman for carrying out written instructions of the publisher or his representatives authorized by this Agreement." But this contention could have validity only where, unlike here, the employer had not delegated complete control over hiring to the foreman, but had prescribed some standards for the discharge of that function or had otherwise reserved control over it. For if, as here, the foreman were given the power without more, there would be no reason for him to assume that he did not remain free to exercise it in accord with his obligations as a union member, particularly since union membership was a specific qualification for the foreman job. Moreover, the foreman would be fortified in this view by the fact that a failure to discharge his union obligations would jeopardize his membership in good

standing, and, in turn, his job as foreman.[12] Nor would the provision exempting the foreman from union discipline for carrying out written instructions of the publisher serve to alter this belief, for the instructions were limited to those authorized by the agreement and nothing in the agreement suggested that the publisher retained the right to instruct the foreman to ignore the Union's priority system and other rules for according preference to union members.[13]

For these reasons, the Board was justified in concluding that the foreman clause demanded by petitioners contemplated that the foreman would exercise his hiring authority in accordance with the ITU rules granting employment preference to ITU members.[14] This conclusion is confirmed by the bargaining nego-

[12] To assume that the foreman would discriminate against non-union employees in these circumstances does not require as a corollary that a non-union foreman may be presumed to discriminate against union employees (Pets. Br. 35). For, in the latter case, there is no showing of an outstanding rule prompting such discrimination by the foreman.

[13] Similarly, even if, as petitioners assert (Br. 32), the question whether the Union could properly discipline a foreman if he obeyed the employer's instructions with respect to hire rather than the Union's, would be subject to arbitration, this, in itself, would hardly be sufficient to induce the foreman to risk a violation of the Union's rules and a loss of his membership in good standing. Contrary to petitioners' contention (Br. 35), the ITU has never given its foremen specific instructions as to which of the obligations under the Laws are in conflict with the Act and thus not binding on them in the discharge of their hiring function (see Board brief in No. 339, p. 33).

[14] The principle reflected in this conclusion—*viz.*, that an intent to operate under closed shop conditions may be inferred,

tiations. First, the foreman clause was coupled with the General Laws clause, which, as we have shown, was tantamount to incorporating the closed shop provisions of the Laws in the contract. Second, the vesting of hiring authority in a foreman, who was required to be a union member, traditionally has been an important part of the ITU's program for maintaining closed shop conditions. See Board brief in No. 339, pp. 26–27; *American Newspaper Publishers Association* v. *National Labor Relations Board,* 193 F. 2d 782, 805 (C.A. 7), certiorari denied on this aspect of the case, 344 U.S. 812. Recognizing this, the publishers here resisted the Union's demand for the clause requiring that the foreman be a union member. And, in the Haverhill negotiations, they offered the alternative of making union membership for foremen *optional*—on the theory that this would relieve the foreman of union control, for he could continue to keep his job though he lost his membership (R. 68–69). Petitioners, however, rejected any attempt to minimize their control over the foreman, and continued to insist on a provision requiring him

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where, as here, an employer has delegated exclusive control over hiring to a foreman who is required to be a union member *and* the rules of the union condition employment upon union membership—was first enunciated by the Board in *Enterprise Industrial Piping Co.*, 117 NLRB 995 (1957). This principle has subsequently been applied in a number of cases, in addition to the instant one (R. 449). See *National Labor Relations Board* v. *United States Steel Corp.* (*American Bridge Division*), 278 F. 2d 896, 898 (C.A. 3, *en banc*), petition for certiorari pending, No. 311, this Term; *National Labor Relations Board* v. *Millwrights' Local 2232*, 277 F. 2d 217, 220 (C.A. 5); *National Labor Relations Board* v. *Local Union No. 450, Operating Engineers*, 281 F. 2d 313 (C.A. 5), petition

to be a union member. In these circumstances, it was entirely reasonable for the Board to conclude that the foreman clause, no less than the Laws clause, was demanded as a means of establishing closed shop conditions in the composing room of the newspapers.[15]

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for certiorari on another point pending, No. 467, this Term; *Carpenters District Council of Detroit* v. *National Labor Relations Board* (C.A.D.C.), December 8, 1960, 47 LRRM 2200.

The principle is analogous to that applied where the union has been delegated exclusive control over seniority. In that situation, too, the Board has concluded that the delegation establishes a discriminatory arrangement in violation of Section 8(a)(3). For by vesting the union with unfettered power, the employer leaves it free to decide seniority issues on the basis of the employees' compliance with union rules, and the employees will so understand and thus be encouraged to be good union members. (*Pacific Intermountain Express Co.*, 107 NLRB 837 (1954), enforced, *sub nom.*, *National Labor Relations Board* v. *Pacific Intermountain Express Co.*, 228 F. 2d 170 (C.A. 8). See also, *National Labor Relations Board* v. *Dallas General Drivers*, 228 F. 2d 702 (C.A. 5); *Machinists, Lodge 727* v. *National Labor Relations Board*, 279 F. 2d 761 C.A. 9), certiorari denied, 364 U.S. 890; *Chief Freight Lines Co.*, 111 NLRB 22, 34, enforced *sub. nom.*, *National Relations Board* v. *Oklahoma City Drivers, Local 886*, 235 F. 2d 105, 106 (C.A. 10); *National Labor Relations Board* v. *Miranda Fuel Co.* (C.A. 2), November 28, 1960, 47 LRRM 2178. The Board found that, in addition to the illegal General Laws and foreman clauses, petitioners' contract proposals contemplated the delegation of exclusive control over seniority to the ITU, R. 481, n. 2.

[15] The contrary holding in *News Syndicate*, 279 F. 2d 323, 330 (C.A. 2), certiorari granted, 364 U.S. 877, No. 339, this Term, rests largely, as the court acknowledged, on its holding that the General Laws clause did not provide for a closed shop, a premise which we have shown to be erroneous. Similarly, the holding in *Honolulu Star-Bulletin*, 274 F. 2d 567, 569–570 (C.A.D.C.), that the foreman clause was not illegal rests on the same erroneous premise, and on the special circumstances of that case which are distinguishable from those here and in *News Syndicate* (see Board brief in No. 339, p. 22, n. 13).

In addition to being illegal for the foregoing reasons, the foreman clause also violated Sections 8(a)(3) and 8(b)(2) because, as the court below concluded (R. 522), it would have caused "the employers to discriminate in favor of union men in appointing their foremen thereby encouraging aspirants for that position to join the union."[16] That is, unless an employee were a union member or willing to become one, the employer could not appoint him as a foreman,

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Footnote 15 continued from p. 31.

Finally, *Carpenters District Council of Milwaukee County* v. *National Labor Relations Board*, 274 F. 2d 564 (C.A.D.C.), relied on by the court in both *News Syndicate* and *Honolulu Star*, is distinguishable from the situation here. In the *Milwaukee* case, the question was simply whether the foreman had relayed instructions to the men to stop work in his capacity as an agent for the employer or in his capacity as an agent for the union, and the court held that, absent evidence to the contrary, it could not be assumed that he was not acting in the former capacity. However, there had been no showing that the employer had delegated exclusive control over the work to the foreman, so that he was free to follow the dictates of the union rules. Where, as here, such delegation has occurred, there is no question that the foreman acts as the union's agent, for the employer has carved matters thus delegated out of the area of its prerogatives and made them solely the concern of the union. Cf. the discussion of the *Milwaukee* case in *Carpenters District Council of Detroit* v. *National Labor Relations Board* (C.A.D.C.), December 8, 1960, 47 LRRM 2200, 2203.

[16] This is not a novel theory invented by the court, as petitioners suggest (Br. 30, 36). The Board has similarly recognized that: "A refusal to accord an actual employee the normal consideration for promotion to a higher position, albeit that of supervisor, based on protected concerted activity during such employment, would clearly be a violation of the rights of nonsupervisory employees." *Pacific American Shipowners Association*, 98 NLRB 582, 597 (1952). The right to refrain from union activity is expressly guaranteed by Section 7, and thus within the area of "protected concerted activity."

and, unless the employee after appointment remained a union member, the employer could not retain him as foreman.[17] This would clearly discriminate against the class of employees who, though otherwise qualified for the job, were not willing to join the Union, or else encourage them to become union members and thus forego their Section 7 right to refrain from union activity without imperiling their employment opportunities. Either result would be contrary to Sections 8(a)(3) and 8(b)(2).[18]

II. THE BOARD PROPERLY FOUND THAT PETITIONERS REFUSED TO BARGAIN, IN VIOLATION OF SECTION 8(b)(3) OF THE ACT, BY INSISTING UPON ACCEPTANCE OF THE ILLEGAL LAWS AND FOREMAN CLAUSES AS A CONDITION PRECEDENT TO THE EXECUTION OF A CONTRACT

The facts summarized in the Statement, *supra*, leave no doubt that petitioners not only proposed the illegal Laws and foreman clauses but made their acceptance

[17] Petitioners' contention (Br. 31–32) that the foreman clause would not limit the employer's choice, in that he was not precluded from selecting an employee who was not *then* a union member, is without substance. For, granted that the employee did not have to be a union member at the outset, he would have to be willing to become and remain one in order to keep the foreman job.

[18] Nor would the protection of these provisions be lost because promotion to a supervisory position is involved and the 1947 amendments to the Act removed supervisors from its protection (see Pets. Br. 36–37). The effect of the union membership requirement on the Section 7 rights of aspirants for the foreman job, who are still employees, keeps it within the Act's reach. See *National Labor Relations Board* v. *Vail Manufacturing Company*, 158 F. 2d 664, 666–667 (C.A. 7), certiorari denied, 331 U.S. 835; n. 16, *supra*.

by the publishers a condition to the execution of a collective bargaining contract. In these circumstances, we submit that the Board and the court below were clearly warranted in concluding that petitioners' insistence on the illegal clauses constituted a refusal to bargain within the meaning of Section 8(b)(3) of the Act.

As the Board observed in the *National Maritime* case, where it first held that a union demand for a contract with closed shop provisions violated Section 8(b)(3): "Compliance with the Act's requirement of collective bargaining cannot be made dependent upon the acceptance of provisions in the agreement which, by their terms or in their effectuation, are repugnant to the Act's specific language or basic policy." *National Maritime Union,* 78 NLRB 971, 982 (1948). This decision was subsequently affirmed by the Second Circuit, *National Labor Relations Board* v. *National Maritime Union,* 175 F. 2d 686, certiorari denied, 338 U.S. 954. And, in *National Labor Relations Board* v. *American National Insurance Company,* 343 U.S. 395, this Court implicitly approved that holding by distinguishing the management functions clause involved in *American National* (which was not illegal) from such cases as *National Maritime,* "where a party bargained for a clause violative of an express provision of the Act" (p. 405, n. 15).[19]

[19] Cf. *National Labor Relations Board* v. *Puerto Rico Steamship Association, et al.,* 211 F. 2d 274, 275, 277 (C.A. 1); *Douds* v. *International Longshoremen's Association,* 241 F. 2d 278, 283 (C.A. 2); *National Labor Relations Board* v. *International Brotherhood of Electrical Workers,* 266 F. 2d 349 (C.A. 5).

Thus, it is settled that, when a union insists upon an illegal condition, it violates its bargaining obligation under the Act. Nor it is relevant that the union may have a good faith belief (see Pets. Br. 38–39) that the provisions which it demanded were legal. As the court below pointed out (R. 522–523), "to hold that good faith is a defense to the charge of refusal to bargain when the contract provision insisted upon is illegal *per se* is to put a premium on ignorance of the law or blind intransigency." Moreover, the decision of this Court in *National Labor Relations Board* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, makes clear that good faith is not a controlling factor in such a situation.[20]

In *Borg-Warner,* the employer advanced, in good faith, a contract clause recognizing the local as the employees' bargaining representative instead of the International, the entity certified by the Board. The Court unanimously agreed that the employer's insistence on such a recognition clause violated the Act's bargaining requirements. Six members of the Court were of the view that the Act merely required bargaining with respect to wages, hours and other conditions of employment, and, since the question of who

[20] See, also, *Lion Oil Company* v. *National Labor Relations Board*, 245 F. 2d 376, 379 (C.A. 8); *National Labor Relations Board* v. *Taormina*, 207 F. 2d 251, 254 (C.A. 5); *Hartsell Mills, Inc.* v. *National Labor Relations Board*, 111 F. 2d 291, 292 (C.A. 4); *McQuay-Norris Manufacturing Company* v. *National Labor Relations Board*, 116 F. 2d 748 (C.A. 7), certiorari denied, 313 U.S. 565; *National Labor Relations Board* v. *Reed & Prince Manufacturing Company*, 118 F. 2d 874, 883 (C.A. 1), certiorari denied, 313 U.S. 595.

was entitled to be recognized as the representative was outside this area, bargaining could not be compelled with respect to that subject. The remaining three members of the Court concurred on the ground that, to seek recognition for the local when the International had been certified, was contrary to Section 9 of the Act, and the Act did not compel bargaining with respect to matters which contravened its specific provisions (356 U.S. at 360, 362).[21]

The court below appears to have been on solid ground, therefore, in holding that a refusal to bargain is shown where, as here, the proposals demanded are contrary to requirements of the Act and, if adopted, would establish illegal employment conditions, and that the Board thus properly concluded that petitioners violated Section 8(b)(3) by conditioning execution of a contract on the illegal General Laws and foreman clauses.

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[21] *Borg-Warner* also involved the validity of the employer's insistence on a ballot clause, which would have required the union, before calling a strike, to poll the employees in the bargaining unit. Five members of the Court likewise found that this subject was outside the area of mandatory bargaining, and that thus the employer's insistence on the ballot clause violated his bargaining obligation. Four members of the Court, however, found the insistence on the ballot clause not unlawful. Three members of the minority were of the view that, since the clause was not itself unlawful as was the recognition clause, the Act did not preclude a party from seeking to obtain it, so long as he acted in good faith (356 U.S. at 351–361). The fourth member of the minority, Mr. Justice Frankfurter, was of the view that the ballot clause was not "so clearly outside the reasonable range of industrial bargaining as to establish a refusal to bargain in good faith" (*Id.* at 351).

III. THE BOARD PROPERLY FOUND THAT PETITIONERS VIOLATED SECTION 8(b)(2) OF THE ACT BY STRIKING TO COMPEL ACCEPTANCE OF THE ILLEGAL LAWS CLAUSE, AND SECTIONS 8(b)(2) AND 8(b)(1)(B) BY STRIKING FOR THE FOREMAN CLAUSE

As shown in the Statement (*supra*, pp. 9, 10), petitioners called the composing room employees at Worcester and Haverhill out on strike to compel acceptance of their bargaining demands. These demands included the foreman and General Laws clauses which illegally conditioned employment in the composing room upon union membership. The ruling of the court below, that strike action in support of such illegal demands is an attempt to cause discrimination in violation of Section 8(b)(2), is in accord with its own prior ruling and those of the other courts of appeals which have considered the question. *National Labor Relations Board* v. *Puerto Rico Steamship Association*, 211 F. 2d 274, 277 (C.A. 1); *National Labor Relations Board* v. *National Maritime Union of America*, 175 F. 2d 686, 689 (C.A. 2), certiorari denied, 338 U.S. 954; *American Newspaper Publishers Association* v. *National Labor Relations Board*, 193 F. 2d 782, 791–796, 802–804 (C.A. 7), certiorari denied on this point, 344 U.S. 812; *United Mine Workers* v. *National Labor Relations Board*, 184 F. 2d 392, 393 (C.A.D.C.), certiorari denied, 340 U.S. 934; *National Labor Relations Board* v. *Local Union No. 55, Carpenters District Council of Denver*, 218 F. 2d 226, 232 (C.A. 10).

Nor is a different conclusion required by petitioners' contention (Br. 38–41) that they did not intend to execute illegal contracts or to have their

proposed contracts applied in an unlawful manner. Since the clauses sought would, if adopted, have resulted in discrimination in violation of the Act, even apart from their enforcement (see p. 21, *supra*), a strike to obtain such clauses is an attempt to cause discrimination under Section 8(b)(2), without the necessity for showing a possible illegal application of the clauses. *United Mine Workers* v. *National Labor Relations Board, supra,* 184 F. 2d at 392–393; *National Labor Relations Board* v. *Local Union No. 55, supra.* As stated by the Tenth Circuit in the *Local Union No. 55* case, concerning comparable union pressure to force the employer to sign an illegal union-security agreement (218 F. 2d at 232):

> The respondents contend that their demands upon the Insurance Company would not have required the dismissal of any of its employees currently on the job. Certainly, the objective of the respondents was to compel the Insurance Company to cease employing nonunion men, including both its present and its future employees. But, if the demands of respondents went only as far as they contend, there would still have been a violation of § 8(b)(2) of the Act. That section proscribes union attempts to cause discrimination based on union membership, not only against specific employees, but also against potential employees. The "prohibition is not confined to those instances in which specific non-union employees are unlawfully discriminated against. It extends as well to instances in which the union, or its agents, seeks to cause the employer to accept conditions under which any non-union em-

ployee or job applicant will be unlawfully discriminated against." [Footnote omitted.]

In addition, the Board properly found that the strike to obtain the foreman clause violated Section 8(b)(1)(B) of the Act. That section makes it an unfair labor practice for a labor organization or its agents "to restrain or coerce * * * an employer in the selection of his representatives for the purposes of collective bargaining *or the adjustment of grievances*" (emphasis supplied). Petitioners do not deny that the composing room foremen at Worcester and Haverhill are management representatives for the adjustment of grievances. By striking to force the publishers to appoint only foremen who were or were willing to become union members, petitioners put pressure on the publishers to confine their choice to that class, thereby necessarily restraining them in their selection of a representative for grievance purposes. Indeed, as the court below noted (R. 521–522), not "only would the clause as proposed by the unions limit the employer's choice of foremen to union members, but it would also give the union power to force the discharge or demotion of a foreman by expelling him from the Union." Accordingly, it follows that petitioners violated Section 8(b)(1)(B) by striking for the foreman clause. See also, *American Newspaper Publishers Association* v. *National Labor Relations Board*, 193 F. 2d 782, 805 (C.A. 7), certiorari denied on this point, 344 U.S. 812.[22]

[22] For the reasons given in n. 17, *supra*, there is no merit to petitioners' contention (Br. 31–32) that their strike for the

IV. THE BOARD'S ORDER IS PROPER

The Board's order, as enforced by the court below (R. 481–485, 526–528), requires petitioners to cease and desist from: (1) refusing to bargain by insisting upon acceptance of the foreman and General Laws clauses or by any "persuasively related" [23] means; (2) engaging in strike action for the purpose of compelling the publishers involved to execute an agreement requiring membership in the ITU as a condition of employment in violation of Section 8(a)(3); (3) in any "persuasively related" manner causing the publishers to discriminate in violation of Section 8(a)(3); and (4) restraining the publishers in the selection of a representative for grievance purposes by insistence upon acceptance of the foreman clause or in any "persuasively related" manner. Affirmatively, the order requires petitioners to bargain collectively upon request, and to post appropriate notices.

We submit that this order is well "adapted to the situation which calls for redress" (*National Labor Relations Board* v. *Mackay Radio & Telegraph Company,* 304 U.S. 333, 348), and hence entitled to stand. The contrary contentions advanced by petitioners (Br. 28, 41–42) appear to be insubstantial.

Thus, petitioners err in assuming that the order restrains them from including in a contract provisions in the General Laws of unquestioned validity, such as those dealing with wages, hours and condi-

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foreman clause was not violative of Section 8(b)(1)(B) because the employer was not required to confine his selection of a foreman to those who were already union members.

[23] See *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426, 433.

tions of employment that are not outlawed by the Act. The order merely precludes them from insisting upon a Laws clause which does not clearly identify and exclude from the contract those provisions in the Laws which impose closed shop conditions.

Similarly, the Board's order with respect to the foreman clause does not preclude petitioners from negotiating about the foreman's duties, responsibilities, and qualifications. It merely proscribes their imposing the condition that the foreman be a union member in order to keep his job—at least, where, as here, there are rules of the union outstanding which require that preference in employment be given to union members.

Finally, the fact that the Board's order does not spell out in detail which of the provisions of the General Laws violate the Act and which do not, does not render the order defective. Having found that petitioners violated the Act by a specific course of conduct—*i.e.*, insisting on the General Laws and foreman clauses—the Board has fulfilled its duty under the statute by prescribing a remedy for the unfair labor practices found and those integrally related thereto. In so doing, the Board has not left petitioners in the dark, but has furnished, in its decision, a definite standard by which they may assess the validity of particular provisons of the Laws. It has indicated that those provisions which expressly condition employment on union membership contravene the Act, as do those which delegate to a union foreman control over hiring, seniority and apprenticeship subject to rules which require him to give preference to union members.

V. THE BOARD PROPERLY HELD THE ITU JOINTLY LIABLE FOR THE UNFAIR LABOR PRACTICES FOUND

The facts summarized above show that Locals 38 and 165 demanded that Haverhill and Worcester execute contracts containing the ITU-approved jurisdiction, Laws and foreman clauses. They also show that Vice-President Lyon and International Representative LaMothe of the ITU actively participated in the negotiations and, pursuant to authority vested in them by ITU, called strikes, when satisfied that the publishers would not yield to petitioners' illegal contract demands.

In these circumstances, it is apparent, as the court below found (R. 526), that the illegal demands of Locals 38 and 165 were made pursuant to policies established by the ITU, and that Lyon and LaMothe participated in the negotiations mainly to further these ITU policies. Accordingly, the court below properly approved the Board's finding (R. 458–459) that Locals 38 and 165 did not negotiate independently of the ITU, and that the ITU and its executive council were thus jointly liable for the unfair labor practices found. *American Newspaper Publishers Association* v. *National Labor Relations Board*, 193 F. 2d 782, 804–805, (C.A. 7), certiorari denied on this point, 344 U.S. 812.[24]

[24] Contrary to petitioners' contention (Br. 44, 47), an international and its locals are not necessarily separate entities for purposes of representation but in appropriate circumstances may be considered joint representatives for purposes of collective bargaining. See in addition to *American Newspaper Publishers Association*, *supra*, *National Labor Relations Board* v. *E. A. Laboratories*, 188 F. 2d 885, 888 (C.A. 2), certiorari denied, 342 U.S. 871; *May Department Stores* v. *National Labor Relations Board*, 326 U.S. 376, 381. Nor does the Board's hold-

Here, as in the cases where both a parent and subsidiary corporation have been held responsible for the commission of unfair labor practices, "What is important * * * is the degree of control over the labor relations in issue exercised by the company charged as a respondent." *National Labor Relations Board* v. *Condenser Corp.*, 128 F. 2d 67, 71 (C.A. 3). Since the ITU did in fact control Locals 38 and 165 in matters involving the commission of the unfair labor practices here, the Board's remedial order properly reaches it.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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ing in this case mean that an international will always be held responsible for the acts of its locals, notwithstanding that its constitution and bylaws disclaim such responsibility (Br. 43–46). The responsibility of the ITU here rests on the circumstance that, irrespective of its rules, it did in fact assume an active role in the negotiations in this case.

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